JUVENILE COURT STATUTES — ARE THEY VOID FOR VAGUENESS?

I. INTRODUCTION

A. History of the Juvenile Court System

The modern juvenile court was born out of a 19th century spirit of social justice.[1] This reform manifested itself in a concern over the need for protection and treatment of children to enable them to lead productive and healthy lives. The earliest reform in the treatment of children occurred in 1824 when the city of New York opened its House of Refuge[2] where for the first time juvenile offenders were separated from adult offenders and were given corrective treatment.[3] Boston (1826) and Philadelphia (1828) followed New York's example and established youth institutions similar to the House of Refuge. In 1848, Massachusetts opened the first state juvenile reform institution.[4]

Despite those advances, the adult offender and the juvenile continued to face the criminal justice system through the same process. In 1899 Illinois set the example for reform in this area by establishing a separate juvenile court.[5] By 1910, twenty-two states had followed the Illinois example; by 1925 all but two states had juvenile courts,[6] and today over 2700 juvenile courts exist in every state and the District of Columbia.[7]

From their inception, the goals of the juvenile courts were to "investigate, diagnose and prescribe treatment, not to adjudicate guilt or fix blame."[8] The aims were protective rather than penal.[9] The child was not to be punished for his behavior, but to be afforded the opportunity to become a worthy citizen.[10]

As nearly as possible, any suggestions of formal criminal proceedings were eliminated from the law of the newly formed juvenile courts. The state did not proceed as an adversary, but rather as a *parens patriae*,[11] dealing with the juveniles in

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1 H. Lou, Juvenile Courts in the United States 1 (1927).

2 P. Tappan, Juvenile Delinquency 392 (1949).

3 The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 3 [hereinafter Task Force Report].

4 A. Kahn, When Children Must Be Committed 1 (1960).

5 Act of April 21, 1899 [1899] Ill. Laws 131. Until recently commentators have viewed the Illinois Act as revolutionary in concept and philosophy. See Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7; Note, Rights and Rehabilitation in the Juvenile Courts, 14 Colum. L. Rev. 281 (1967). But exponents of a revisionist view of the early juvenile court acts have seen the 1899 Act not as innovative in concept, but as an imposition of conservative middle class views upon children. See Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187 (1970); A. Platt, The Child Savers: The Invention of Delinquency (1969). For a tempered view of the juvenile court movement which avoids both the exaggerated claims of the early commentators and the pessimistic view of the revisionists, see Schultz, The Cycle of Juvenile Court History, 19 Crime and Delin. 457 (1973).

6 Task Force Report, supra note 3, at 3.

7 H. Foster, Children and the Law 776 (1970).

8 Id.

9 Commonwealth v. Fisher, 213 Pa. 48, 49, 62 A. 198, 199 (1905).

10 In Re Perham, 104 N.H. 276, 184 A.2d 449 (1962).

11 See Note, The *Parens Patriae* Theory and Its Effect on the Constitutional Limits of Juvenile Court Power, 27 U. Pitt. L. Rev. 894 (1966).

the same manner a wise parent would care for a wayward child.[12] The *parens patriae* concept was also intended to guide the states in their post-adjudication treatment of the juvenile. When a juvenile court found it impossible to strengthen family ties and thus necessary to remove the child from his surroundings in order to promote his welfare, the statutes provided that the child was to be afforded "care and protection as nearly as possible equivalent to that which should have been given him by his parents."[13] Therefore it would seem to have been intended that the child was not to be dealt whith punitively except insofar as punishment was incidental to the parent–child relationship.

Since a child must, as a matter of law, always be in the custody and thereby under the dominion of some person or entity, the state, acting as *parens patriae*, was also empowered to deny the child certain procedural rights which were available to adults on the assumption that a child, unlike an adult, has a right "not to liberty, but to custody."[14] The child was not permitted the same due process rights in a juvenile court hearing which the state afforded an adult in a criminal proceeding.[15] This denial of rights was justified by characterizing the juvenile proceeding as a civil determination of guilt.

Juvenile court statutes have traditionally been exempted from the rigorous constitutional standards to which other statutes have often been subjected,[16] in part on the basis of a *quid pro quo* theory. The child relinquishes his claim to the adversary system and its incidents in exchange for the benefits of informality and the promise of rehabilitation in place of punishment.[17]

In recent years, however, the juvenile court systems have been undergoing a reappraisal perhaps as significant as the original movement to create the courts some seventy-five years ago. Both legal commentators[18] and courts[19] have directed severe

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[12] Task Force Report, supra note 3, at 22-23. See, e.g., Law of April 21, 1899 [1899] Ill. Laws 137:

> This act shall be liberally construed to the end that its purpose may be carried out, to wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents.

See also White v. Reid, 126 F. Supp. 867 (D.C.D.C. 1954); Wang, The Continuing Turbulence Surrounding the *Parens Patriae* Concept in American Juvenile Courts, 18 McGill L.J. 219 (1972).

This concept, rooted in social welfare theory rather than criminal jurisprudence, was the basis for the development of the juvenile court system. The statutes sought to determine the needs of both the child and society, not to judge criminal conduct. In re Gault, 387 U.S. 1, 16 (1967); Kent v. United States, 383 U.S. 541, 554 (1966). See also Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv. L. Rev. 775 (1966).

[13] White v. Reid, 126 F. Supp. 867, 870 (D.C.D.C. 1954).

[14] In re Gault, 387 U.S. 1, 17 (1967); see Shears, Legal Problems Peculiar to Children's Courts, 48 A.B.A.J. 719, 720 (1962).

[15] Pee v. United States, 274 F.2d 556, 561 (D.C. Cir. 1959). It was feared that compelling the juvenile courts to adhere to due process standards would, as an end result, defeat many benefits of the informal system.

[16] A number of unsuccessful attempts have been made to apply the vagueness doctrine to juvenile court statutes. See note 118 infra.

[17] Commonwealth v. Fisher, 213 Pa. 48, 50, 62 A. 198, 200 (1905).

[18] Bayh, A Time for Improvement in the Juvenile Justice System, 22 Juv. Ct. Judges J. 30 (1971); Dorsen & Resnick, *In re Gault* and the Future of the Juvenile Law, 1 Family L.Q. 1, 15-16 (1967); Ellrod & Melaney, Juvenile Justice: Treatment or Travesty? 11 U. Pitt. L. Rev. 277 (1950). The high rate of juvenile crime and recidivism has added to the growing discontent over the operation of the juvenile court systems. See Note, *Paterns Patriae* and Statutory Vagueness in the Juvenile Court, 82 Yale L.J. 745, 749 n.33 (1972), [hereinafter Note, *Parens Patriae*], President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 80 (1967).

[19] In re Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); Gesicki v. Oswald, 336 F. Supp. 365 (S.D.N.Y. 1971), aff'd mem., 406 U.S. 913 (1972).

criticism at the juvenile court systems because of the disparity between their theoretical aims and practical operations.[20]

B. The Statutes Today

Included within the purview of today's juvenile courts are a large number of children[21] who are neither dependent nor neglected,[22] and who have not committed acts which would be considered crimes if committed by an adult.[23] These youths charged with noncriminal acts comprise one-third of the juvenile courts' caseload.[24] Such children are sometimes described as "incorrigible,"[25] "habitually truant,"[26] "beyond control"[27] or "in danger of living an idle, dissolute, lewd, or immoral life."[28] These characterizations, which are typically general and ambiguous, are found in the juvenile court statutes in almost every state.[29] Taken together they denote a class of children which may collectively be termed "incorrigibles."

Currently two types of juvenile court statutes deal with incorrigibility. For convenience they may be classified as traditional and modern. The traditional statute defines delinquency broadly, so as to include the status of incorrigibility as well as those acts which would be criminal if committed by an adult. Prior to 1960 all juvenile statutes were of this type; it is still found in a majority of jurisdictions.[30]

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[20] Task Force Report, supra note 3, at 9. For a defense of the juvenile courts' operations see Lincoln, Remember the Good as Well as the Bad, 22 Juv. Ct. Judges J. 26 (1971).

[21] Most states classify all juveniles under 18 years of age as "children." See, e.g., Colo. Rev. Stat. Ann. § 22-1-1 (Supp. 1967); Kan. Stat. Ann. § 38-802 (Supp. 1972).

[22] "Dependent" and "neglected" are terms of art. They categorize juveniles who are neither "delinquent" nor "incorrigible," but who are subject to a hearing and to disposition and care under the juvenile court statute because they are destitute, homeless, abandoned or do not have proper parental care or guardianship. See, e.g., Md. Ann. Code Art. 26, § 70-1(j), (k) (1957). But see Wash. Rev. Code Ann. § 13-04.010, in which incorrigibles are labeled "dependent children."

[23] Task Force Report, supra note 3, at 4; see Sheridan, Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System? 31 Fed. Prob. 27 (March 1967).

[24] Bazelon, Beyond Control of the Juvenile Court, 21 Juv. Ct. Judges J. 42 (1970). One study has indicated that an equally large percentage of the juveniles in jail pending hearings, in detention programs and in correctional institutions for delinquent children have not committed criminal acts. Sheridan, supra note 23, at 27.

[25] N.Y. Family Ct. Act. § 712 (McKinney Supp. 1973).

[26] Utah Code Ann. § 55-10-77 (Supp. 1973).

[27] Ore. Rev. Stat. § 419.476 (1971).

[28] Cal. Welf. & Inst'ns § 601 (West 1966).

[29] See notes 30-31 infra. "In most states, at the present time, these terms are seldom defined with preciseness in the law. Therefore, many of these terms often have a different meaning to various parties involved even within the same jurisdiction – a factor which has caused conflict and confusion." U.S. Social and Rehabilitation Service, HEW, Legislative Guide for Drafting Family and Juvenile Court Acts, Children's Bureau Pub. No. 472, at 6 (1969).

[30] The New Jersey statute is typical:

> Juvenile delinquency is hereby defined as the commission by a child under 18 years of age (1) of any act which when committed by a person of 18 years of age or over would constitute:
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> a. A felony, high misdemeanor, misdemeanor, or other offense, or
> b. The violation of any penal law or municipal ordinance, or
> c. Any act or offense for which he could be prosecuted in the method partaking of the nature of a criminal action or proceeding,
> d. *Being a disorderly person, or (2) of the following acts:*
> e. *Habitual vagrancy, or*
> f. *Incorrigibility, or*
> g. *Immorality, or*
> h. *Knowingly associating with thieves or vicious or immoral persons, or*
> i. *Growing up in idleness or delinquency, or*

During the last decade, however, many states have revised their juvenile court acts. A majority of the new statutes afford incorrigibles a legal status distinct from that of the delinquent child who has committed a criminal act, although a single court is still charged with the supervision of both.[31] This change in legal status was initiated to halt the indiscriminate stigmatization of all children within the courts' jurisdiction as "delinquents,"[32] and, more importantly, to effect an intention to establish different remedial programs for the incorrigible and the delinquent.[33] Nevertheless, a number of

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j. *Knowingly visiting gambling places, or patronizing other places or establishments, his admission to which constitutes a violation of the law, or*
k. *Idly roaming the streets at night, or*
l. *Habitual truancy from school, or*
m. *Deportment endangering the morals, health or general welfare of said child.*

N.J. Rev. Stat. § 2A: 4-14 (Supp 1972) (emphasis added).

Other statutes of this type include: Ala. Code tit. 13, § 350 (1958); Ark. Stat. Ann. § 45-204 (1971); Conn. Gen. Stat. Rev. § 17-53 (Supp 1972); Del. Code Ann tit. 10, § 901 (Supp. 1972); D.C. Code Ann. § 11-1551 (1966); Idaho Code § 16-1803 (Supp. 1972); Ind. Ann. Stat. § 9-3204 (Supp. 1972); Iowa Code Ann. § 232.3 (1969); Ky. Rev. Stat. § 208.020 (1969); Me. Rev. Stat. Ann tit. 15 § 2502 (1964); Mich Comp. Law § 712 A.2 (Supp. 1973); Minn. Stat. Ann. § 260.015 (1971); Miss. Code Ann. § 43-21-5 (1972); Mo. Rev. Stat. § 211.031 (1959); Mont. Rev. Codes Ann. § 10-602 (1947); Nev. Rev. Stat. § 201.90 (1967); N.H. Rev. Stat. Ann. § 169:2 (1972); Ore. Rev. Stat. § 419.476 (1971); Pa. Stat. Ann. tit. 11, § 50-102 (1973); S.C. Code Ann § 15-1103(9) (1962); Utah Code Ann. § 55-10-77 (Supp. 1973); Va. Code Ann. § 16.1-158 (Supp. 1973); W. Va. Code Ann. § 49-1-4 (1966).

31 The New York statute is typical of this more enlightened approach to juvenile justice. In the New York statute the definition of "juvenile delinquents" does not include "incorrigibles":

> (a) "Juvenile Delinquent" means a person over seven and less than sixteen years of age who does any act which, if done by an adult would constitute a crime.

The New York type of statute created a new category to cover incorrigibles, "Persons in Need of Supervision" [hereinafter PINS]:

> (b) "Persons in Need of Supervision" means a male less than sixteen years of age and a female less than eighteen years of age who does not attend school in accord with the provisions of part one of article sixty-five of the education law or who is *incorrigible, ungovernable,* or *habitually disobedient* and *beyond the lawful control of parent or other lawful authority.*

N.Y. Family Ct. Act § 712 (McKinney Supp. 1973) (emphasis added).

Other state juvenile court statutes which have adopted this form include: Alaska Stat. § 47.10.010 (1971); Ariz. Rev. Stat. Ann § 8-201 (Supp. 1972); Cal. Welf. & Inst'ns § 601 (West 1966); Colo. Rev. Stat. Ann. § 22-1-3 (Supp. 1967); Fla. Stat. Ann. § 39.01 (Supp. 1973); Ga. Code Ann. § 24 A-401 (1972); Hawaii Rev. Stat. tit. 31, ch. 571-11 (Supp. 1972); Ill. Ann. Stat. § 37: 702-3 (Supp. 1972); Kan. Stat. Ann. § 38-802 (Supp. 1972); La. Rev. Stat. Ann. § 13:1569 (Supp. 1974); Md. Ann. Code art. 26, § 70-1(1) (1973); Mass. Gen. Laws Ch. 119, § 52 (1965); Neb. Rev. Stat. § 43-201 (1968); N.C. Gen. Stat. § 7A-278 (1969); N.M. Stat. Ann. § 13-14-3 (Supp. 1973); N.D. Cent. Code § 27-20-02 (Supp. 1973); Ohio Rev. Code Ann. § 2151.022 (1971); Okla. Stat. tit. 10, §1101 (1971); R.I. Gen. Laws § 14-1-3 (1969); S.D. Compiled Laws Ann. § 26-8-7.1 (Supp. 1973); Tenn. Code Ann. § 37-202 (Supp. 1973); Vt. Stat. Ann. tit. 33, § 632 (Supp. 1973); Wash. Rev. Code § 13.04.010 (Supp. 1972); Wis. Stat. 48,12 (Supp. 1973); Wyo. Stat. Ann. § 14-115.2 (1973).

32 See N.Y. Joint Legislative Committee on Court Reorganization, The Family Court Act, pt. 2, at 7 (1962).

33 The experience in New York is instructive. In 1962 when the Family Court reform was enacted in that state, the Joint Legislative Committee on Court Reorganization, which drafted the Family Court Act, recommended that PINS be treated differently from delinquents, specifically omitting incarceration in training schools with delinquents as a dispositional alternative for PINS. Second Report of the Joint Legislative Committee on Court Reorganization, McKinney's 1962 Session Laws 3435. The Committee also expressed the expectation that the new PINS category would permit the court to use "appropriate resources" in dealing with Persons in Need of Supervision. Id. However, the legislature failed to provide the funds necessary to create the additional, specialized facilities for the care and treatment of PINS. Private agencies could not provide sufficient services for a vast number of PINS, so the following year the legislature temporarily amended the Act to allow judges to institutionalize PINS in training schools with

states which have adopted the new classifications still treat the delinquent and incorrigible alike.[34] Separate treatment is necessary if the new statutory classifications are to have any meaning. No purpose is served by removing incorrigibles from unfit homes and environments only to commit them to state institutions and truancy schools where they are incarcerated with youthful felons.[35] A change in label without a corresponding alteration in the post-hearing treatment of incorrigibles is merely a change of form without substance.

In recent years the juvenile courts have been required to adopt many of the procedural safeguards constitutionally required in adult criminal proceedings, at least where the dispositional treatment of the juvenile is penal in nature.[36] Some constitutional inquiry has also been directed at the substantive law under which a child is adjudicated delinquent or incorrigible.[37] Statutory definitions contained in omnibus incorrigibility statutes, framed not to proscribe specific acts but to recognize and include children indicating some pathological syndrome, lack the precision required of adult criminal law statutes.

After briefly setting forth what are generally accepted to be the components of the void for vagueness doctrine, this Note will proceed to consider to what extent that doctrine might be, and when, if at all, it should be applied to incorrigibility clauses in juvenile court statutes.

II. THE VOID FOR VAGUENESS DOCTRINE

The term "vagueness" conveys an impression that semantic considerations are of primary importance in "void for vagueness" rulings. Such is not the case. Not every linguistically vague term will be judged constitutionally indefinite. In its application of the vagueness doctrine, the Supreme Court has often declared the same word or phrase permissible in one statute and unconstitutionally vague in another where the need for precision was more compelling.[38]

Some threshold degree of semantic vagueness is necessary, however, to prompt a vagueness inquiry.[39] In a study of the statutory use of indefinite terms, Professor Paul

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delinquents (ch. 477 § 1 [1963] Laws of N.Y. 1899). Because of the continued lack of alternative facilities, in 1968 the legislature authorized the use of training schools for PINS on a permanent basis, thereby precluding the reform intended by the adoption of the separate PINS classification (ch. 874 § 3 [1968] Laws of N.Y. 2654). However, the recent ruling by the New York Court of Appeals in In re Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973), may force the legislature to provide separate facilities for the care and treatment of PINS. See text accompanying notes 166-75 infra.

For a detailed analysis of the treatment of PINS under N.Y. Family Ct. Act § 712(b) (McKinney Supp. 1973), see Note, Nondelinquent Children in New York: The Need for Alternatives to Institutional Treatment, 8 Colum. J.L. & Soc. Prob. 251 (1972). See also Office of Children's Services, Judicial Conference of the State of New York, The PINS Child: A Plethora of Problems (Nov. 1973).

[34] See, e.g., Wash. Rev. Code § 13.04.095 (Supp. 1972). Contra, Fla. Stat. Ann. § 39.11 (Supp. 1973).

[35] Courts have recognized that the statutory distinction between "delinquents" and PINS "becomes useless when the treatment accorded one must be identical to that accorded the other because no other adequate alternative has been provided." Matter of Jeanette P., 34 App. Div. 2d 661, 310 N.Y.S. 2d 125 (2d Dep't 1970). See also Matter of Ellery C., 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973).

[36] See text accompanying notes 90-97 infra.

[37] See text accompanying notes 117-49 infra.

[38] Compare United States v. L. Cohen Grocery, 255 U.S. 81 (1921) with Edgar A. Levy Leasing Co., v. Siegel, 258 U.S. 242 (1922) ("unreasonable"). Compare United States v. Ragen, 314 U.S. 513 (1942) with Cline v. Frink Dairy Co., 274 U.S. 445 (1927) ("reasonable").

[39] Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 88 [hereinafter Note, Void-for-Vagueness].

Freund has distinguished three grades of certainty in statutory language: "Precisely measured terms, abstractions of common certainty, and terms involving an appeal to judgment and degree."[40] Each constitutes, in descending order, a grade of certainty. The language which has been the primary target of vagueness attacks falls within Freund's third category: terms of judgment and degree. It is precisely this type of language which permeates juvenile court statutes.[41] Therefore the typical juvenile court statute, whether of the traditional or modern type, laden with terms of degree and invitations to normative judgment, displays that threshold imprecision necessary to justify a constitutional inquiry.

Since the vagueness doctrine was first invoked in 1914,[42] commentators and courts have repeatedly attempted to articulate the concepts which underlie it.[43] Recent Supreme Court cases have affirmed the commentators' thesis that the doctrine is compounded of several distinct yet related elements,[44] most notably:

(1) Fair Notice: a concern that the statute "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute;"[45]
(2) Adequate Standards: a concern that the standards which police, judges and juries apply be properly defined, lest the administration of the law become arbitrary and uncontrolled;[46]

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[40] Freund, The Use of Indefinite Terms In Statutes, 30 Yale L.J. 437 (1921).

[41] Compare the New Jersey Juvenile Court statute:

> Knowingly associating with thieves or vicious or immoral persons. . . . Knowingly visiting gambling places, or patronizing other places or establishments, his admission to which constitutes a violation of law . . . idly roaming the streets at night.

N.J. Rev. Stat. § 2A: 4-14 (j), (k) (Supp. 1972) with the provisions of the Jacksonville vagrancy statute declared void for vagueness in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972):

> Persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or places where alcoholic beverages are sold or served.

Jacksonville Ordinance Code § 26-57 (1965).

Compare the California juvenile court statute attacked in Gonzalez v. Mailliard, No. 50424 (N.D. Cal., Feb. 9, 1971), appeal docketed, 39 U.S.L.W. 3500 (U.S. Apr. 9, 1971) (No. 1565, 1970-71 term; renumbered No. 70-120, 1971-72 term) (" . . . who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life," Cal. Welf. & Inst'ns § 601 (West 1966)) with the Colorado vagrancy statute declared unconstitutionally vague in Goldman v. Knecht, 295 F. Supp. 897 (D.C. Colo., 1969) (" . . . leading an idle, immoral or profligate course of life," Colo. Rev. Stat. § 40-8-19 (1963)).

[42] International Harvester Co. v. Kentucky, 234 U.S. 216 (1914).

[43] Collings, Unconstitutional Uncertainty – An Appraisal, 40 Cornell L.Q. 195; Note, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like, 3 Crim. L. Bull. 205 (1967) [hereinafter Note, Crimes of Status]. Some commentators have attributed the development of the vagueness doctrine in federal law to the common law practice of the judiciary refusing to enforce legislative acts deemed too uncertain to be applied; see Note, Constitutional Law, Void for Vagueness: An Escape from Statutory Interpretation, 23 Ind. L.J. 272 (1948).

[44] For a detailed exposition of this thesis see Note, Crimes of Status, supra note 43, at 217-33.

[45] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), citing United States v. Harriss, 347 U.S. 612, 617 (1954); see Grayned v. Rockford, 408 U.S. 104, 108 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Palmer v. Euclid, 402 U.S. 544, 545 (1971). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." United States v. National Dairy Products Corp., 372 U.S. 29, 32-33 (1963), citing United States v. Harriss, 347 U.S. 612, 617 (1954).

[46] Grayned v. Rockford, 408 U.S. 104, 108 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966).

(3) Overbreadth: the concern that broad statutory language may inhibit constitutionally protected behavior by purporting to prohibit it or by merely suggesting that it might be prohibited.[47]

The typical omnibus incorrigibility clause contained in a juvenile court statute offers little to reassure one harboring any of these concerns.

A. Fair Notice

Because juvenile court statutes are designed not to outlaw and punish specific acts, but to provide flexible tools to bring children evincing certain sociopathological traits within the court system for the purpose of treatment, incorrigibility clauses are usually couched in broad, vague language.

Certain fair notice deficiencies acknowledged to exist in criminal law, although not by themselves of constitutional dimension, are not only present in juvenile court statutes but are exacerbated by the vague language of these statutes.[48] Moreover, the language contained in the omnibus incorrigibility clauses of juvenile court statutes generally is similar to that contained in vagrancy statutes which have been declared void for vagueness by the federal courts.[49]

Both the traditional[50] and modern[51] juvenile court statutes fail to give the child adequate notice of what he may or may not do. No notice is given concerning how trivial the acts may be about which the youth remains intransigent, or how many times a child must skip school in order to be adjudged "beyond control" or an "habitual truant,"[52] or whether refusal to cut his hair or bathe more frequently would subject him to a charge of "incorrigibility." Because the majority of those appearing in juvenile courts are poor,[53] an adjudication of incorrigibility often results from the imposition of middle class values upon the culture of poverty.[54] Many of those appearing before the courts are unaware that their activities, which are accepted modes of behavior in their socioeconomic community, may subject them to adjudication as an incorrigible.[55]

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47 Grayned v. Rockford, 408 U.S. 104, 108 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); see Note, Void-for-Vagueness, supra note 39, at 76.

48 See text accompanying notes 49-55 infra.

49 See note 41 supra.

50 See text accompanying note 30 supra.

51 See text accompanying note 31 supra.

52 A single act of misconduct is insufficient grounds for a PINS adjudication. Matter of Richard K., 35 App. Div. 2d 716, 314 N.Y.S.2d 1004 (1st Dep't 1970); Bordone v. F., 33 App. Div. 2d 890, 307 N.Y.S.2d 527 (4th Dep't 1969).

53 See Berg, Economic Factors in Delinquency, Task Force Report, supra note 3, Appendix O, at 305; Werthman, The Function of Social Definitions in the Development of Delinquent Careers, Task Force Report, supra note 3, Appendix J, at 155; Wolfgang, The Culture of Youth, Task Force Report, supra note 3, Appendix I, at 145.

54 See A. Platt, The Child Savers: The Invention of Delinquency 98 (1969). See also Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1487 (1970).

55 This problem is more acute where juvenile statutes focus on moral behavior, making sexual promiscuity among adolescents a basis for adjudication as a delinquent or incorrigible, e.g., "Immorality," N.J. Stat. Ann. § 2A: 4-14 (Supp. 1972); "Who from any cause is in danger of living an idle, dissolute, lewd or immoral life," Cal. Welf. & Inst'ns § 601 (West 1966); see Paulsen, Juvenile Courts, Family Courts, and the Poor Man, 54 Calif. L. Rev. 694 (1966).

B. Adequate Standards and Arbitrary Enforcement

Omnibus clauses in juvenile court statutes also fail to provide juvenile agencies, administrators or judges with any clear guidelines for enforcement.[56] This situation encourages the imposition of an official's own standard of appropriate behavior and encourages the evaluation of conduct "on an ad hoc and subjective basis."[57]

Incorrigibility is often determined on the basis of the public face the child has presented to officials rather than on the basis of the offenses he has committed. Police and probationary officers frequently initiate the juvenile justice process by their selective identification of those who should receive attention, and this selection may be merely a reflection of the individual officer's definition of delinquency or incorrigibility.[58] Indeed, because standing to file a PINS petition is granted to parents, teachers, police officers and childrens' agency officials, it is impossible for the child to know to whose sensitivities he must conform.[59] The definition of "incorrigible" is so much an "appeal to judgment or question of degree"[60] that it is easy to imagine a situation in which no matter what a child does, someone is liable to be offended and initiate a PINS proceeding.

Once brought before the court for a hearing, the child is confronted by the values of the individual judge. Terms such as "incorrigible,"[61] "beyond control"[62] and "wayward"[63] can mean one thing to a judge with authoritarian views on child rearing and quite another to a judge inclined toward permissiveness in raising children.[64] Reasonable adults, as well as the adolescents and children with whose conduct the statutes are concerned, must certainly differ in their estimates of what conduct constitutes incorrigibility.[65]

Commentators have indicated that the potential for arbitrary action inherent in culturally biased standards has in fact resulted in racially discriminatory enforcement of juvenile court statutes.[66] In a society as diverse as ours, conflicting views as to what

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56 See Task Force Report, supra note 3, at 25.

57 Grayned v. Rockford, 408 U.S. 104, 109 (1972). However, the same broadly framed language which encourages arbitrary enforcement also permits a juvenile court judge to exercise his discretion whether to leave the child in the care of his parents or to place him under the auspices of the court so that he may be assigned to a juvenile home or institution. More precisely drawn statutes might effectively tie the hands of the juvenile court judge and certain conduct would automatically subject the child to disposition as an incorrigible.

58 See Gonion, Section 601 California Welfare and Institutions Code: A Need for a Change, 9 San Diego L. Rev. 294 (1972).

59 In order to satisfy void for vagueness standards of due process, a statute should indicate upon whose sensitivity a violation depends, "the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man." Coates v. City of Cincinnati, 402 U.S. 611, 613 (1971). See Plaintiff's Brief, In re Patricia A., 31 N.Y.2d 833, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972).

60 Cf. text accompanying note 40 supra.

61 Ariz. Rev. Stats. § 8-201 (Supp. 1973).

62 Hawaii Rev. Stats. § 571-11(2)(c) (Supp. 1972).

63 R.I. Gen. Laws § 14-1-3 (1969).

64 Judge Dembitz has noted that the language of the New York juvenile court statute permits the judge to exercise broad discretion in determining whether the incorrigible child is within the court's jurisdiction and, if so, what disposition should be afforded the child. Dembitz, Ferment & Experiment in New York: Juvenile Cases in the New Family Court. 48 Cornell L.Q. 499, 508 (1963).

65 Task Force Report, supra note 3, at 25.

66 See N. Kittrie, The Right to Be Different 120 (1971); Office of Children's Services, Judicial Conference of the State of New York, Juvenile Injustice Report of the Policy Committee 49-53 (1973); Note, *Parens Patriae*, supra note 18, at 764; cf. Note, Juvenile Delinquents: The Police, State Courts, and Individual Justice, 79 Harv. L. Rev. 775, 782 (1966).

constitutes socially acceptable conduct are inescapable, but when arbitrariness is built into the judicial system it can become a vehicle for depriving minors of their freedom without due process of of law.[67]

C. Overbreadth

The broad language of juvenile court statutes permits the prosecution of both lawful and unlawful activities.[68] Commentators have noted that statutory overbreadth, a problem which is closely related to the concern over inadequate standards for the decision maker,[69] is even more dangerous in juvenile cases where considerable differences in attitudes and values are likely to separate the juvenile from the judge.[70] The Task Force Report noted that juvenile court statutes have been utilized to enforce conformity, eliminating "long hair, levis, and other transitory adolescent foibles,"[71] behavior hardly within the intended or, perhaps, the permissible scope of regulation.

Juvenile court statutes may also be employed to punish or threaten behavior with which the states may not constitutionally interfere. The mere threat of a juvenile proceeding may have a chilling effect on the exercise of first amendment rights, particularly those of speech and association.[72] For example, a fifteen-year-old's insistence on wearing a button bearing an unpopular political slogan, or wearing a black armband[73] or his refusal to desist from participating in a peaceful demonstration may fall within the meaning of incorrigibility,[74] or because the statute is so broadly worded, within its apparent meaning, even if no prosecutions were actually intended for such behavior.

If subjected to the standards of statutory clarity demanded by the Supreme Court in a forthright application of the vagueness doctrine to criminal statutes, the omnibus clauses of juvenile court statutes would be found unconstitutionally vague. They fail to satisfy the requisite standards of fair notice, fail to assuage fears that they encourage arbitrary and discriminatory application and fail to avoid potentially overbroad interpretation and application. Yet as previously pointed out, juvenile court statutes have until recently been immune from constitutional attack on vagueness grounds.[75] In the light of recent federal court decisions and the constitutional policy which they articulate, the continued immunity of these statutes is open to serious question.

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67 1970 Interim Session of the California Legislature-Juvenile Court Processes: Report of the Assembly Interim Committee in Criminal Procedure 22 (1970).

68 See note 72 infra.

69 Statutes lacking reasonable standards are "susceptible of sweeping and improper application." NAACP v. Button, 371 U.S. 415, 433 (1963).

70 Note, Void-for-Vagueness, supra note 39, at 76.

71 Task Force Report, supra note 3, at 25. See also Peliavin and Briar, Police Encounters with Juveniles, 70 Am. J. Sociology 206 (1964).

72 In Gonzalez v. Mailliard, No. 50424 at 2 (N.D. Cal., Feb. 9, 1971), appeal docketed, 39 U.S.L.W. 3500 (U.S. Apr. 9, 1971) (No. 1565, 1970-71 Term; renumbered No. 70-120, 1971-72 Term), police arrested eight boys on the grounds that they were "in danger of living a lewd and dangerous life." Cal. Welf. & Inst'ns § 601 (West 1966). The arrests were made because the police believed the youths were members of the "24th Street Gang." See text accompanying notes 135-49 infra.

73 See Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

74 See In re Burrus, 4 N.C. App. 523, 167 S.E.2d 454 (1969), modified, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub. nom. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). See generally Note, *Parens Patriae*, supra note 18, at 76; Starrs, A Sense of Irony in Southern Juvenile Courts, 1 Harv. Civ. Rights-Civ. Lib. L. Rev. 129 (1966).

75 See note 16 supra.

III. THE EVOLVING CONSTITUTIONAL LAW OF THE JUVENILE COURT

A. Recent Supreme Court Decisions

Cognizant of the inequities exposed by the recent reappraisal and criticism of the juvenile court system, the Supreme Court, in the late 1960's, began to take steps to assure that "the basic requirements of due process and fairness"[76] were satisfied in juvenile court proceedings.

In *Kent v. United States*,[77] the first in the recent series of cases dealing with the rights of children in juvenile court proceedings, the Supreme Court noted that the state's power as *parens patriae* was not unlimited.[78] *Kent* was followed by the landmark case of *In re Gault*[79] which wrought far-reaching changes in juvenile court proceedings.

Gault concerned a fifteen-year-old, already on probation, who had been committed to a juvenile institution after he was apprehended for making obscene remarks over the telephone. The Court rejected the *quid pro quo* theory,[80] and the attachment of a civil label of convenience to the juvenile court hearings, as mere excuses for denying juveniles due process guarantees.[81] The Court also reiterated the approach expressed in *Kent*, that the *parens patriae* philosophy was inadequate as a basis for determining the appropriate procedures at adjudicative hearings,[82] and recognized that where the juvenile was subject to potential deprivations of freedom, unbridled judicial discretion, no matter how benevolently implemented, was a poor substitute for procedural safeguards.[83] Therefore in order to satisfy the due process requirement of "fundamental fairness"[84] in delinquency hearings, the Court held that certain procedural safeguards which go to the heart of the factfinding process must be provided:[85]

(1) fair notice of the specific charges must be afforded to both the parents and the child;[86]
(2) the child is entitled to counsel and, if indigent, to have a court-appointed counsel;[87]
(3) the juvenile has the right to invoke the privilege against self-incrimination;[88]
(4) the juvenile must be afforded an opportunity to confront and cross-examine witnesses.[89]

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76 Kent v. United States, 383 U.S. 541, 553 (1966).

77 383 U.S. 541 (1966).

78 "[T]he admonition to function in a parental relationship is not an invitation to procedural arbitrariness." 383 U.S. at 555.

79 387 U.S. 1 (1967).

80 Id. at 22. See text accompanying note 17 supra.

81 387 U.S. at 36.

82 Id. at 30-31.

83 Id. at 18. See also Note, Juvenile Statutes and Noncriminal Delinquents: Applying the Void-for-Vagueness Doctrine, 4 Seton Hall L. Rev. 184, 188 (1972).

84 McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).

85 Justice Fortas noted that "neither the fourteenth amendment, nor the Bill of Rights is for adults alone." 387 U.S. at 13.

86 Id. at 33.

87 Id. at 41.

88 Id. at 55. Although the privilege against self-incrimination is not usually conceived of as integral to a fair factfinding process, see Johnson v. New Jersey, 384 U.S. 719, 728-34 (1966), the Court in *Gault* noted that innocent juveniles, suggestible and impressionable, might inculpate themselves even when not technically coerced. 387 U.S. at 45-46.

89 Id. at 57.

In *Gault* the Court expressed serious concern over the post-hearing treatment afforded youths in the juvenile justice system.[90] The Court's decision, that certain due process guarantees provided in adult criminal proceedings should also be applied in juvenile deliquency hearings, was based in large measure upon consideration of the penal nature of the post-hearing disposition afforded juveniles adjudged "delinquents."[91] The Court recognized that juvenile courts were stigmatizing youths by labeling them delinquents[92] and incarcerating them in institutions which failed to provide substantially more rehabilitative or therapeutic treatment than adult penal institutions.[93] The Court also found it to be of no import that the child was deprived of his freedom in what was called an "industrial school" or "receiving home" rather than in a prison.[94] The "school" represented an institution of confinement and the incarceration represented a deprivation of his freedom.[95]

Following *Gault* the Supreme Court issued a further mandate for procedural change in the juvenile court system with its decision in *In re Winship*.[96] *Winship* concerned a twelve-year-old charged with delinquency for taking money from a woman's purse. The Supreme Court replaced the "preponderence of evidence" standard with the "beyond a reasonable doubt" standard in delinquency proceedings where the youth was charged with an act which would constitute a crime if committed by an adult.[97] As in *Gault*, the Court in *Winship* perceived that the juvenile was entitled to certain due process rights because the punitive dispositional treatment afforded those adjudged delinquents was "comparable in seriousness to a felony" prosecution.[98] The procedural rights afforded the juvenile in the *Winship* decision, like those afforded in *Gault*, went to the integrity of the factfinding process.[99]

The "constitutional domestication"[100] of the juvenile courts, undertaken by the Supreme Court in *Kent*, *Gault* and *Winship*, reached a limit in *McKeiver v. Pennsylvania*.[101] The plurality opinion by Justice Blackmun held that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."[102] The Court pointed out that while *Gault* and *Winship* had established "fundamental fairness" as the applicable due process standard in juvenile proceedings, it was not the Supreme Court's

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90 Id. at 26-27.

91 Id at 27. See also Leach v. State, 428 S.W.2d 817, 822 (Tex. Civ. App. 1968), where in a concurring opinion Justice Johnson noted that the Texas juvenile court statute "is penal in its effect for the court may commit the child to a public institution until the child reaches the age of twenty-one years."

92 387 U.S. at 24.

93 Id. at 22. In reaching its holding in *Gault*, the Court limited its concern to proceedings in which there was an adjudication of "delinquency" leading to possible confinement. Id. at 13. However, because of the emphasis placed on the penal nature of the incarceration, it would appear that any juvenile court statute which would incarcerate a child in an essentially penal institution, no matter what label he was given or whether he had committed an act which would be criminal if committed by an adult, would provide a punitive basis similar to that upon which *Gault* was premised, thus entitling the juvenile to the due process safeguards guaranteed in *Gault*.

94 387 U.S. at 27.

95 Id. at 27. It is important to recognize, however, that a child's freedom is certainly not comparable to that of an adult. By law a child must always be in the custody or under the supervisory dominion of some person. A child's freedom cannot be defined without reference to this fact. Therefore the internment of a child in a foster home or halfway house might not be viewed by the courts as a material deprivation of the child's liberty, and the need for due process rights might not be present where these represented the only dispositional alternatives. But see text accompanying notes 143-45, 177-78 infra.

96 397 U.S. 358 (1970).

97 Id. at 364.

98 Id. at 366; accord, In re Gault, 387 U.S. 1, 36 (1967).

99 See McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).

100 In re Gault, 387 U.S. 1, 22 (1967). See also In re Terry, 438 Pa. 339, 346, 265 A.2d 350, 354 (1970).

101 403 U.S. 528 (1971).

102 Id. at 545.

intent that all rights constitutionally assured to an adult criminal defendant be enforced or made available to the juvenile in his delinquency proceeding.[103] Justice Blackmun remarked that although the present juvenile justice system contains many defects,[104] it was not his view that they would be remedied by the implementation of jury trials.[105] The plurality emphasized the importance and uniqueness of the informal nature of the juvenile court proceeding.[106] Justice Blackmun expressed the belief that the imposition of a jury trial would not greatly strengthen the factfinding function of the hearing; rather, what has been the idealistic prospect of an intimate, informal, protective proceeding "would develop the delay, formality and clamor of the public trial."[107] After examining the nature of the jury trial, he employed a balancing test, weighing the state interests in an informal juvenile process against the interests of the child served by a jury trial, and concluded that a jury was not fundamental to a fair hearing.[108]

To deduce from its past decisions whether the Supreme Court would apply the vagueness doctrine to juvenile court statutes, it is necessary to determine whether the right to statutory clarity is more closely related to the procedural rights guaranteed in *Gault* and *Winship* or to the right to a jury trial which the *McKeiver* opinion did not find necessary to assure that juvenile proceedings meet the due process requirement of "fundamental fairness."

The plurality opinion in *McKeiver* recognized that the "fundamental fairness" due process standard, applicable through *Gault* and *Winship* to juvenile court proceedings, emphasized the importance of factfinding procedures, and that the rights afforded the juveniles in *Gault* and *Winship* reflected this emphasis.[109] In *McKeiver* Justice Blackmun maintained that a jury trial was unnecessary for accurate factfinding, and indeed would not strengthen the factfinding process at all.[110] In contrast, the right to statutory clarity, like those due process rights guaranteed in *Gault* and *Winship*, goes to the integrity of the factfinding process. In a vague statute, the very facts which may be made the basis of the adjudication are often inadequately specified.

The *McKeiver* decision also cites dictum in *Duncan v. Louisiana*[111] which noted that a jury is not necessary for a fair trial.[112] Statutory clarity, on the other hand, has been called the first essential of due process[113] and has been applied by the Supreme Court in both criminal and civil cases.[114] Unlike the introduction of a jury trial, a

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103 Id. at 534-35.

104 Id. at 547; see Task Force Report, supra note 3, at 9, outlining many of the shortcomings observed by Justice Blackmun. It was the Court's feeling that the abuses of the juvenile court system were not of constitutional significance. 403 U.S. at 548.

105 403 U.S. at 547.

106 Id. at 534.

107 Id. at 550. Justice Blackmun felt that the requirement of a trial by jury would "be disruptive of the unique nature of the juvenile process." Id. at 540, quoting In re Terry, 438 Pa. 339, 350, 265 A.2d 350, 355 (1970).

108 403 U.S. at 545-50. For a detailed description of the balancing see Note, *Parens Patriae*, supra note 18, at 752.

109 403 U.S. at 543.

110 Id. at 547.

111 391 U.S. 145, 149-50 n.14 (1968).

112 403 U.S. at 547.

113 Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

114 The vagueness doctrine has been invoked by the Supreme Court in civil cases where the defendant was threatened with a material deprivation. As early as 1925, the Supreme Court applied the vagueness doctrine to a civil case in A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925). In *Small*, a contract action, the defendant (buyer) sought a defense under the Lever Act, ch. 80, 41 Stat. 297 (1919), amending Ch. 53, 40 Stat. 277 (1919), on the grounds that the plaintiff (seller) would make an "unreasonable profit" on the transaction. In United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921), the Supreme Court had voided, on vagueness grounds, the section of the Lever Act relied upon by the defendant. The Court rejected the defendant's attempt to distinguish this earlier case on the basis of its criminal nature.

requirement of statutory clarity would not disturb the atmosphere of informality which surrounds current juvenile court proceedings and which benefits the child. In fact, commentators have noted that a failure to enforce a requirement for statutory clarity and the continued application of broadly drawn juvenile court statutes which lack such clarity, would render meaningless the very rights accorded to juveniles in *Gault*.[115]

Therefore the right to statutory clarity appears to be closely related to those procedural rights which the Supreme Court has seen fit to extend to juvenile court proceedings. Even when subjected to a balancing test similar to that employed in *McKeiver*, the right to statutory clarity fairs far better than the right to a jury trial.[116] The state's interest in a vague, overbroad incorrigibility statute is weaker than its interest in maintaining the procedural informality of the juvenile court hearing, while the child's interests, served by the adoption of a narrower, more concisely drawn juvenile court statute are far greater than those served by the adoption of a jury trial. Thus it seems reasonable to conclude that the Supreme Court's recent decisions in the area have made possible the application of the vagueness doctrine to juvenile court statutes.

B. Federal Court Decisions after *Gault*

Following the Supreme Court's decision in *Gault*, a number of attacks were launched upon the broad language of juvenile court statutes.[117] Many of these attempts to apply the vagueness doctrine in this area met with little success.[118] However, two

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> *The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.* It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

A.B. Small Co. v American Sugar Refining Co., 267 U.S. 233, 239 (1925) (emphasis added).

In Giaccio v. Pennsylvania, 382 U.S. 399 (1966), the Supreme Court reaffirmed its rejection of the concept that the vagueness doctrine only applies to criminal statutes. The Court struck down a civil statute which permitted a jury to assign costs to acquitted defendants if they were found to be guilty of "some misconduct." Id. at 404. Justice Black noted the extreme difficulty of preparing a defense to such general and abstract charges as "misconduct" or "reprehensible misconduct," id., and emphasized that

> [b]oth liberty and property are specifically protected by the 14th amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled "penal" or not must meet the challenge that it is unconstitutionally vague.

Id. at 402.

115 Note, Juvenile Statutes and Noncriminal Delinquents: Applying the Void-for-Vagueness Doctrine, 4 Seton Hall L. Rev. 184, 200 (1972).

116 See Note, *Parens Patriae*, supra note 18, at 760-66.

117 In re Daniel R., 274 Cal. App. 2d 749, 79 Cal. Rptr. 247 (Dist. Ct. App. 1969); Commonwealth v. Brasher, ___Mass.___, 270 N.E.2d 389 (1971); State v. L.N., 109 N.J. Super. 278, 263 A.2d 150, aff'd per curiam, 57 N.J. 165, 270 A.2d 409 (1970), cert. denied, 402 U.S. 1009 (1971); In re Patricia A., 31 N.Y.2d 833, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972); E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969).

118 In E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), a Texas civil court upheld the state's juvenile court act which defined a delinquent as one "who habitually so deports himself as to injure or endanger the morals or health of himself or others." Acts of 1943, 48th Leg; p. 313 ch. 204 [1943] (repealed 1973). The court felt that the word "morals" conveyed a concrete impression to the ordinary person. Although it conceded that the definition of a delinquent child was in "general terms," id. at 227, the court was of the opinion that a statutory requirement for the filing of a petition alleging the specific acts or conduct which constituted the prohibited behavior provided a safeguard sufficient to protect the child's rights at the adjudicative stage of the proceedings. Id. Accord, M. Midonick, Children, Parents and the Courts: Juvenile Delinquency, Ungovernability and Neglect 13-14 (1972). But see Lanzetta v. New Jersey, 306 U.S. 451, 453

recent federal court decisions have considered the constitutionality of statutes ostensibly addressed to that conduct which would subject a juvenile to court proceedings but which would not subject an adult to criminal prosecution, and have utilized reasoning which could lead to a Supreme Court ruling that omnibus incorrigibility clauses in many juvenile court statutes are unconstitutionally vague.

1. Gesicki v. Oswald

In *Gesicki v. Oswald*[119] a three-judge district court found the New York Wayward Minor Act[120] void for vagueness. *Gesicki* concerned a nineteen-year-old girl who was expelled from school for alleged sexual promiscuity, adjudged "morally depraved" or "in danger of becoming morally depraved" under the Act, and eventually placed in an adult correctional institution.[121] Although the court specifically distinguished the Act, on the basis of its penal dispositional character, from civil juvenile proceedings under the Family Court Act,[122] the court's reasoning permits a broader reading of the case to encompass juvenile proceedings.[123]

In defense of its position the state invoked its authority as *parens patriae*, contending that the Act should not be subjected to the vagueness doctrine as it is applied in criminal statutes, since the Wayward Minor Act provides rehabilitative treatment for children and adolescents who would otherwise "graduate from their 'wayward' tendencies to a criminal or at least unhealthy adult life."[124] The court rejected this argument and found that the Act provided "wholly inadequate safeguards against arbitrary application and insufficient guarantees that minors sentenced as wayward would be treated non-punitively."[125] The court further held that the Act failed to require or provide for

(1939): "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."

Parens patriae arguments were successfully advanced against attacks on vagueness grounds in State v. L.N., 109 N.J. Super., 278, 263 A.2d 150 (1971) ("growing up in idleness or delinquency" and "deportment endangering the morals, health, or general welfare of said child." N.J. Stat. Ann. § 2A: 4-14 (1972)) and in Commonwealth v. Brasher, ___Mass.___, 270 N.E.2d 389 (1971) ("stubborn child" law, Mass. Gen. Laws Ann. ch. 272 § 53 (1970)).

In another recent case, In re Patricia A., 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972), the New York Court of Appeals upheld the constitutionality of New York's PINS statute (Family Ct. Act § 712 (b) (McKinney 1973)), which defines PINS by the use of such terms as "incorrigible," "ungovernable" and "habitually disobedient." The New York court failed to reflect the straightforward approach applied by many federal courts in voiding a number of vague vagrancy statutes. See note 45 supra. Instead the court held that the aforesaid terms were easily understandable and that the PINS statute was "sufficiently definite to pass constitutional muster." In re Patricia A., 31 N.Y.2d at 87, 286 N.E.2d at 434, 335 N.Y.S.2d at 36 (1972). The New York court's opinion was reminiscent of the pre-*Gault* decision in United States v. Meyers, 16 Alaska 368, 143 F. Supp. 1 (D. Alas. 1956) where the court held the statutory classification "any child under the age of eighteen years . . . who is in danger of becoming or remaining a person who leads an idle, dissolute, lewd or immoral life," to be "perfectly clear."

119 336 F. Supp. 371 (S.D.N.Y. 1971), aff'd mem., 406 U.S. 913 (1972).

120 N.Y. Code Crim. Proc. § 913-a (McKinney 1958) (expired Aug. 31, 1971). The legislature permitted section 913-a to expire on August 31, 1971, although persons found to have violated the statute prior to that date remained "subject to its provisions until the expiration of their terms in custody, parole, or probation." Gesicki v. Oswald, 336 F. Supp. 365, 366 n.6 (1971).

121 336 F. Supp. at 373.

122 336 F. Supp. at 377 n.7. Statutory jurisdiction over juvenile offenders is contained in New York's Family Court Act § 712(b) (McKinney 1973). In contrast, the Wayward Minor Act, N.Y. Code Crim. Proc. § 913-a(5), (6) (McKinney 1958) (expired Aug. 31, 1971), was included in New York's criminal code, and under the latter code the juvenile was subject to general criminal trials and incarceration in an adult penal institution.

123 Note, Juvenile Statutes and Noncriminal Delinquents: Applying the Void-for-Vagueness Doctrine, 4 Seton Hall L. Rev. 184, 191 (1972).

124 336 F. Supp. at 376.

125 Id. at 377.

"special treatment substantially distinguished from that accorded to criminals and reasonably related to the conditions upon which the adjudication of waywardness is based."[126] Thus the Act treated juveniles as criminals without affording them the constitutional due process protections granted in adult criminal proceedings.

Citing recent Supreme Court decisions voiding vagrancy statutes, the *Gesicki* court accordingly applied a straightforward vagueness test, holding that the terms "morally depraved" and "in danger of becoming morally depraved" went far beyond the "bounds of permissible ambiguity in a standard of defining a criminal act."[127] The court concluded that a statute which fails adequately to define what conduct will bring the juvenile within its reach,[128] which fails to protect against arbitrary application[129] and which is indistinguishable from a criminal provision,[130] does not comport with the *McKeiver* due process requirement of "fundamental fairness."[131]

In *Gault* and *Winship* the Supreme Court extended certain due process safeguards to juvenile delinquency proceedings because of the penal nature of the incarceration afforded those adjudicated "delinquents." The court in *Gesicki* examined the dispositional treatment under the New York Wayward Minor Act and reasoned that because the juveniles were subject to incarceration in adult penal institutions, they were entitled to some of the due process guarantees accorded defendants in criminal proceedings. Citing the Supreme Court's holding that lack of specificity in a penal statute "violates the first essential of due process,"[132] the court ruled that the right to statutory clarity was one of the due process rights which must be provided.[133]

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126 Id at 379. This indicates the possible existence of a right to treatment. See Birnbaum, Right to Treatment, 46 A.B.A.J. 499 (1960); Symposium – The Right To Treatment, 57 Geo. L.J. 673 (1969). The right to treatment was first recognized in cases dealing with involuntary commitment to institutions because of insanity or mental defect. Gough, The Beyond Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox, 16 St. Louis U.L.J. 182 (1972). In Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966), Chief Judge Bazelon intimated that the right to treatment might be constitutionally dictated and that possible support for such a proposition could be found in either the fourteenth amendment's due process or equal protection clauses, or in the eighth amendment's prohibition of cruel and unusual punishment. See Kittrie, Can the Right to Treatment Remedy the Ills of the Juvenile Process? 57 Geo. L.J. 848, 860 (1969).

In Wyatt v. Stickney, 325 F. Supp. 781, enforced, 334 F. Supp. 1341 (M.D. Ala. 1971), a federal district court ruled that patients involuntarily admitted to state mental institutions where they did not receive adequate treatment were denied substantive due process. *Wyatt's* substantive due process rationale has not yet been extended to include the rights of juveniles to recieve treatment. Pyfer, The Juvenile's Right to Receive Treatment, 6 Family L.Q. 279, 296 (1972). However, in In re Elmore, 382 F.2d 125 (D.C. Cir. 1967), and in Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967), the courts noted that a child is entitled to custody which is not inconsistent with the *parens patriae* premise of the law, implying that some right to rehabilitative treatment exists. Some courts have taken a "treat or release" approach toward juveniles. In In re I, 64 Misc. 2d 878, 316 N.Y.S.2d 356 (Fam. Ct. 1970), a New York City court held that a youth facility's refusal or inability to treat a PINS required that the court terminate the child's placement.

Purpose clauses of juvenile court acts, which commit the juvenile courts to provide the child with care, custody and discipline "which approximate as nearly as may be that which should be given by its parents," Wash. Rev. Code § 13.04.140 (1972), provide a handle for implementing the "right to treatment" concept. Schultz, The Cycle of Juvenile Court History, 19 Crime and Delin. 476 (1973); see also United States v. Alsbrook, 336 F. Supp. 973 (D.C.D.C. 1971); In re Ellery C. 32 N.Y.2d 588, 300 N.E. 2d 424, 347 N.Y.S.2d 51 (1973); text accompanying notes 169-76 infra. See generally M. Midonick, Children, Parents and the Courts: Juvenile Delinquency, Ungovernability and Neglect 18-26 (1972); Wang, The Continuing Turbulence Surrounding the *Parens Patriae* Concept in American Juvenile Courts (Part 2), 18 McGill L.J. 418, 439 (1972).

127 336 F. Supp. at 374.

128 "'Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt.'" Id. at 375, quoting Musser v. Utah, 333 U.S. 95, 97 (1948).

129 336 F. Supp. at 379.

130 Id.

131 Id.

132 Id., citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

133 336 F. Supp. at 378. Although *Gesicki* was not concerned with juvenile court proceedings, the court took occasion to comment on the New York juvenile justice system, quoting a statement by Milton Luger, the Director of the State's Division for Youth:

In sum, the importance of *Gesicki* as a basis for a vagueness assault on certain juvenile court statutes stems from the court's willingness to void a vague statute which the state claimed to be rehabilitative but which in fact proved to be penal in nature. *Gesicki* may therefore be interpreted as standing for the proposition that the *Gault* rationale should be extended to include statutory clarity and adequate notice among those due process rights afforded juveniles, where dispositional treatment results in punishment rather than rehabilitation.[134]

2. *Gonzalez v. Mailliard*

In *Gonzalez v. Maillaird*,[135] another recent district court decision, a three-judge court held the omnibus incorrigibility clause of California's juvenile court statute[136] void for vagueness. After a report of an assault on a young woman, police arrested eight members of the "24th Street Gang"[137] on the grounds that they were "in danger of leading an idle, dissolute, lewd or dangerous life."[138] Although the charges were later dropped and the gang members subsequently released, the juveniles sought a declaratory judgment that section 601 of the California Welfare and Institutions Code[139] was unconstitutional and that any further arrests under section 601 should therefore be enjoined.

The court rejected the defendant's argument that traditional vagueness considerations are not applicable to civil juvenile court statutes, pointing out that vagueness may be a constitutional infirmity in both criminal and civil statutes.[140] As was the case in *Gesicki*, the court in *Gonzalez* looked to the nature of the post-hearing treatment of the juveniles.[141] Reflecting the influence of *Gault* and *Winship*, both of which recognized the need for procedural safeguards in juvenile court proceedings where the child might be subject to incarceration and potential deprivation of freedom, the court emphasized the

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> With the exception of a relatively few youths, it would probably be better for all concerned if young delinquents were not detected, apprehended or institutionalized. Too many of them get worse in our care.

Samuels, When Children Collide with the Law, N.Y. Times, Dec. 5, 1971 §6 (Magazine), at 146.

134 The Supreme Court affirmed *Gesicki* in a memorandum decision marking the first time that the Supreme Court had employed the vagueness doctrine to void a statute concerned with noncriminal juvenile conduct. However, the Court's action is not necessarily a harbinger of further declarations that juvenile court statutes are void for vagueness. As previously pointed out, the federal district court had specifically noted that they were not concerned with state procedures for the special supervision of juveniles. 336 F. Supp. at 377 n.7. It is quite likely that the Supreme Court's affirmation of the lower court decision merely indicated that a statute like the New York Wayward Minor Act, which fails to qualify as a bona fide juvenile statute, will not be subjected to the relaxed constitutional standards applied to juvenile statutes.

135 No. 50424 (N.D. Cal., Feb. 9, 1971), appeal docketed, 39 U.S.L.W. 3500 (U.S. Apr. 9, 1971) (No. 1565, 1970-71 Term; renumbered No. 70-120, 1971-72 Term).

136 Cal. Welf. & Inst'ns § 601 (West 1966).

137 The arrest infringed upon the youths' right of association. See text accompanying notes 72-74 supra.

138 Cal. Welf. & Inst'ns § 601 (West 1966).

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> Any person under the age of 21 who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, custodian or school authorities, or who is beyond the control of such person, or any person who is a habitual truant from school within the meaning of any law of this state, or who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

Cal. Welf. & Inst'ns § 601 (West 1966) (amended, 1971, to lower the jurisdictional age from 21 to 18 years).

140 No. 50424 at 8; see note 114 supra.

141 No. 50424 at 8.

social stigma of a juvenile court adjudication and the seriousness of the possible deprivation of freedom under section 601 as the reasons for applying the vagueness doctrine to the juvenile court statutes.[142]

Gonzalez thus extended the *Gesicki* rationale from criminal proceedings leading to potential incarceration in an adult penal institution to juvenile court proceedings leading to potential incarceration in a low security juvenile institution. Moreover, the court asserted that the deprivation of freedom in a low security juvenile institution[143] could not be distinguished from the deprivation in an adult penal institution merely on the basis of the rehabilitative ideal of the former.[144] This indicates a willingness on the part of the court to examine the efficacy of the treatment afforded juveniles.[145]

Once it had determined the penal nature of the post-adjudication treatment of juveniles,[146] the *Gonzalez* court made the same straightforward application of the vagueness doctrine employed by other federal courts in voiding vagrancy statutes.[147] It recognized that the vagueness of a statute like section 601 effectively rendered all other due process guarantees meaningless.[148] For these reasons the court found it necessary to extend the *Gault* rationale to include statutory clarity among those due process rights necessary for juvenile court proceedings and voided a portion of section 601.[149]

For the last three years *Gonzalez* has remained on the Supreme Court calendar;[150] it presents the Court with its first opportunity to determine the constitutionality of an omnibus incorrigibility clause in a juvenile court statute.[151] As evidenced by *McKeiver*,

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142 Id. at 8-9. The court noted that "[t]he more extensive the deprivation, the greater the due process requirement for certainty of statutory language." Id. at 8; see Jordan v. DeGeorge, 341 U.S. 223, 231 (1951); Winters v. New York, 333 U.S. 507, 515 (1948).

143 "A child within the provisions of section 601 may be adjudicated a 'ward' of the juvenile court and be committed to a juvenile home or camp established by the various [California] counties." No. 50424 at 8; see Cal. Welf. & Inst'ns § 730 (West 1966).

144 No. 50424 at 9.

145 See text accompanying notes 176-78 infra.

146 Wards of the court under § 601 could be placed in direct contact with children committed for conduct amounting to a crime under Cal. Welf. & Inst'ns § 602 (West 1966) (delinquents). Those adjudicated § 601 wards might also be required to perform physical labor, compensation for which would be left completely within the discretion of the county board of supervisors. Commitment to such camps and homes might extend until the child's twenty-first birthday, or for two years after his adjudication, whichever is longer. No. 50424 at 10.

147 Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971); Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968); Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969). In People v. Allen, 22 N.Y.2d 465, 470, 239 N.E.2d 879, 881, 293 N.Y.S.2d 280, 282 (1968), the New York Court of Appeals noted the theoretical relationship between arguments for invalidating vague vagrancy statutes and omnibus clauses in juvenile court statutes. See also the dissent by Justice Cadena in E.S.G. v. State, 447 S.W.2d 225, 231 (Tex. Civ. App. 1969), cert. denied, 398 U.S. 956 (1970). Justice Cadena challenged the argument that the application of less strict constitutional standards to juvenile court proceedings is justified because their purpose is to determine a present or future condition while a criminal proceeding is concerned with past conduct. He indicated that vagrancy statutes have been declared void for vagueness, although the "crime" of vagrancy deals with a person's condition rather than with the commission or omission of an act.

148 No. 50424 at 10.

149 Id. The court in *Gonzalez* did not declare the entire statute void but merely the portion which reads: "... or who from any cause is in danger of leading an idle, dissolute, lewd or immoral life." The court noted that the other two bases for adjudication under § 601 present serious vagueness problems. However, the court failed to declare the entire statute void because the factual situation raised by the parties did not present an adequate case for consideration of the other portions of § 601 and the court did not find the statute to be so indivisible that the whole must fall with a part. Id. at FN1 n.13, see Cal. Welf. & Instn's § 601 (West 1966).

150 Appeal docketed, 39 U.S.L.W. 3500 (U.S. Apr. 9, 1971) (No. 1565, 1970-71 Term; renumbered No. 70-120, 1971-72 Term).

151 The issue of vague juvenile statutes has been before the Supreme Court once before, but the Court provided a summary disposition which shed little light on the substance of the question. In Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971), aff'd mem., 406 U.S. 913 (1972), the statute under consideration, the New York Wayward Minor Statute, N.Y. Code Crim.

the Court is not yet prepared to abandon the idea of a separate informal court system to handle the unique problems of children.[152] However, such a system need not be endangered by a decision that the omnibus clauses of juvenile court statutes are void for vagueness.

IV. ALTERNATIVES TO EXISTING OMNIBUS CLAUSES

Three courses of action are open to a state if it wishes to preserve the informality of a separate court sytem for juveniles and avoid the consequences of an unconstitutionally vague omnibus clause. First, it can change the language of its statutes to delineate more narrowly the specific acts which will subject a juvenile to an adjudication as an incorrigible. Second, it can eliminate the penal aspects of the post-adjudication dispositional treatment afforded its incorrigibles. Third, it can remove incorrigibles from the jurisdiction of its juvenile court systems.

If a state pursues the first course of action, it will have to eliminate the broadly worded omnibus incorrigibility clauses and replace them with definitions which illuminate with greater specificity the conduct that will subject a child to the jurisdiction of the juvenile court.

Texas has accomplished this in its newly enacted Family Court Act.[153] After defining delinquent conduct as that which violates a Texas penal law punishable by imprisonment or confinement in jail,[154] the Act provides a definition of conduct indicating "a need for supervision."[155] The definition is free of vague language and concentrates on specific acts rather than on modes of behavior.[156] The new Texas statute also provides that children whose conduct indicates a need for supervision be provided with dispositional treatment different from that afforded those who have committed delinquent acts.[157]

Proc. § 913(a) (McKinney 1958) (expired Aug. 31, 1971), was a penal statute and not one of that state's juvenile court statutes aimed at "special supervision" and "treatment" for children. See notes 122, 134 supra. See Mattiello v. Connecticut, 4 Conn. Cir. 55, 225 A.2d 507, cert. denied, 154 Conn. 737, 225 A.2d 201 (1966), appeal dismissed for want of federal question, 395 U.S. 209 (1969).

152 403 U.S. 528, 547 (1971).

153 Tex. Rev. Civ. Stat. tit. 3, § 51.03 (1973).

154 Id.

155 Id.

156 Conduct indicating a need for supervision is:

(1) conduct, other than a traffic offense, that on three or more occasions violates either of the following:
  (A) the penal laws of this state of the grade of misdemeanor that are punishable by fine only; or
  (B) the penal ordinances of any political subdivision of this state;
(2) conduct which violates the compulsory school attendance laws;
(3) the voluntary absence of a child from his home without the consent of his parent or guardian for a substantial length of time without intent to return; or
(4) the violation of an order of a juvenile court entered under Section 54-04 or 54-05 of this code pursuant to a determination that the child engaged in conduct which violates the compulsory school attendance laws or the voluntary absence of the child from his home without the consent of his parent or guardian for a substantial length of time or without intent to return.

Tex. Rev. Civ. Stat. tit. 3, § 51.03 (1973).

157 Tex. Rev. Civ. Stat. tit. 3, § 54.04 (1973).

The second alternative open to states attempting to avoid the application of the vagueness doctrine to their juvenile court statutes is to attack the vagueness problem at its roots, the post-adjudication treatment, or more appropriately, the lack thereof, afforded juveniles adjudged incorrigible. The recognition of the penal nature of this treatment and the resulting deprivation of the child's freedom has previously served as a catalyst, causing courts to extend certain due process rights to juvenile proceedings and to apply the vagueness doctrine to juvenile court statutes. *Gault*,[158] *Winship*[159] and *Gonzalez*[160] all focused their attention on the dispositional treatment afforded juveniles, concluding that a civil label of convenience would not prevent them from applying the due process rights where the disposition was penal in nature.[161] In confronting juvenile court statutes, the constitutional concern may be more appropriately focused, not upon the wording of the statute, but upon the failure of the juvenile court systems to provide incorrigibles with adequate nonpunitive treatment. The elimination of penal treatment might effectively undercut the basis of the decisions in *Gault*, *Winship* and *Gonzalez*, and obviate the need to afford the juvenile certain due process rights.

Incorrigibility clauses prevalent in juvenile court statutes are undoubtedly vague.[162] It does not necessarily follow, however, that they be found void for vagueness.[163] The danger of a material deprivation must be present to provoke the application of the vagueness doctrine.[164] If state legislatures were to provide nonpunitive dispositional treatment for incorrigibles, separate and distinct from that afforded delinquents, then the material deprivation necessary for an application of the vagueness doctrine would be lacking. Although semantically vague, the juvenile court statutes would not be subject to an attack on vagueness grounds.

This is the approach recommended in the Uniform Juvenile Court Act.[165] The Act contains a category "unruly children" which allows the juvenile court to maintain jurisdiction over children guilty of noncriminal conduct.[166] However, the Uniform Act recommends that the unruly child not be institutionalized with delinquents, but merely referred to a social agency or placed on probation.[167]

The New York Court of Appeals has adopted a similar posture. Having already sustained the omnibus incorrigibility clause of the New York Family Court Act[168] against an attack on vagueness grounds,[169] the court more recently held, in *In re Ellery C.*,[170] that PINS could not be incarcerated in state training schools with delinquents.[171] The court noted that there is a vital distinction between a finding of delinquency and a determination that a child is in need of supervision,[172] and that "proper facilities must be made available to provide adequate supervision and treatment for children found to be persons in need of supervision."[173] The New York Family Court Act provides that a

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158 387 U.S. at 27.

159 397 U.S. at 366.

160 No. 50424 at 8, 9.

161 In re Winship, 397 U.S. at 365-66; In re Gault, 387 U.S. at 36; Gonzalez v. Mailliard, No. 50424 at 8.

162 See text accompanying note 48 supra.

163 See text accompanying note 38 supra.

164 See note 114 supra.

165 National Conference of Comm'rs on Uniform State Laws, Uniform Juvenile Court Act (1968), 77 Handbook of the National Conference of Comm'rs on Uniform State Laws and Proceedings of the Annual Conference 246 (1968).

166 Uniform Juvenile Court Act, supra note 165, at § 2(4).

167 Id. at § 32. However, the Uniform Act provides that a child who has commited an adult crime (delinquent child) may be incarcerated in a state training facility. Id. at § 31.

168 N.Y. Family Ct. Act § 712(b) (McKinney 1973).

169 In re Patricia A., 31 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972).

170 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1972).

171 Id. at 592, 300 N.E.2d at 425, 347 N.Y.S.2d at 54.

172 Id. at 590-91, 300 N.E.2d at 425, 347 N.Y.S.2d at 53.

173 Id. at 591, 300 N.E.2d at 425, 347 N.Y.S.2d at 53.

dispositional hearing in a case involving delinquency is for the purpose of determining whether the child requires "supervision, treatment, or confinement,"[174] while the hearing to ascertain if the child is a PINS must merely determine if the juvenile requires "supervision or treatment."[175] The court in *Ellery C.* noted that the legislature's omission of the word "confinement" in the purpose clause describing PINS adjudications was no mere oversight, and demanded that separate facilities be provided for PINS so that they might get "such care, protection and assistance as will best enhance their welfare."[176]

It should be noted, however, that incarceration in separate training schools may yet represent a material deprivation of the child's freedom, leaving the New York statute vulnerable to a vagueness attack. Thus far courts have failed to develop any clear line delineating penal from nonpenal treatment. The Court in *Gault* noted the penal nature of incarcerations in "receiving-homes" and "industrial schools."[177] The court in *Gonzalez* expanded this idea and found incarceration in low security juvenile camps and juvenile homes to be punitive in nature also, despite the rehabilitative aims of the facilities, because such incarceration deprived the juvenile of his freedom.[178] Children themselves perceive commitment in an institution, regardless of the treatment goal, to be at least partly punitive.[179]

The third and most drastic alternative open to the states is to remove incorrigibles from the juvenile court system, limiting it to jurisdiction over juveniles who have committed delinquent acts. This is the alternative recommended by the Task Force Report.[180] The inclusion of incorrigibles within the jurisdiction of the juvenile courts is based in large part on the questionable theory that certain modes of behavior are pre-delinquent in nature and that subjecting a child who evidences such behavior to treatment may prevent him from committing delinquent or criminal acts at a later time. However, "[t]here does not appear to be any substantial evidence that 'incorrigibles' are more likely than other children to commit more serious offenses subsequently."[181]

In 1967 the President's Commission on Law Enforcement and Administration of Justice recommended that youth service bureaus be established to coordinate all community services for young people.[182] The Commission pointed out that the bureaus would be more economical and more effective in reducing the incidents of recidivism than juvenile correctional institutions.[183] Since that time the movement to deal with incorrigibles through the use of diversified, community based treatment in lieu of institutionalization has gained acceptance and some measure of success.[184]

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174 N.Y. Family Ct. Act § 743 (McKinney 1973).

175 Id.

176 32 N.Y.2d at 591, 300 N.E.2d at 425, 347 N.Y.S.2d at 53, quoting N.Y. Family Ct. Act § 255 (McKinney 1973).

177 387 U.S. at 27.

178 No. 50424 at 8. See text accompanying note 143 supra.

179 See Allen, The Borderline of the Criminal Law: Problems of "Socializing" Criminal Justice, 32 Soc. Sci. Rev. 107, 117 (1958).

180 "In view of the serious stigma and uncertain gain accompanying official action, serious consideration should be given complete elimination from the courts' jurisdiction of conduct illegal only for a child." Task Force Report, supra note 3, at 27.

181 Bureau of Social Science Research, Research Memorandum, "Status Offenders" 22 (March 11, 1972). See Task Force Report, supra note 3, at 93.

182 President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 83 (1967).

183 Id. at 165-66.

184 Bureau of Social Science Research, supra note 181, at 34-39. See Note, A Proposal for the More Effective Treatment of the "Unruly" Child in Ohio: The Youth Services Bureau, 39 U. Cinn. L. Rev. 275 (1970). See also Youth Development and Delinquency Prevention Administration, Social and Rehabilitation Service, HEW, The Challenge of Youth Service Bureaus, DHEW Pub. No. (SRS)73-26024 (1973). But see Howlett, Is the YSB All It's Cracked Up to Be? 19 Crime and Delin. 485 (1973).

V. CONCLUSION

Three-quarters of a century after the establishment of the first juvenile court, administrators and legislators have still been unable to translate the *parens patriae* ideal into practice. The Supreme Court has recognized the penal nature of the treatment afforded juveniles and accordingly has guaranteed the child certain due process rights at juvenile court proceedings.

Whether or not the Supreme Court chooses to affirm *Gonzalez* and to apply the vagueness doctrine to the omnibus incorrigibility clauses of juvenile court statutes, states should take steps to bring the actual operations of the juvenile court systems in line with the humane ideals upon which they are based. Punitive aspects of the post-adjudication treatment visited upon incorrigibles should be eliminated and replaced by guidance and rehabilitation. Failing this, incorrigibiles should be removed from the juvenile court's jurisdiction and the courts should pursue a more limited role, dealing only with juveniles who have committed criminal acts.

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